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Supreme Court, U.S.  
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No. 93-518

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In The  
**Supreme Court of the United States**  
October Term, 1993

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FLORENCE DOLAN,

*Petitioner,*

v.

CITY OF TIGARD,

*Respondent.*

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On Petition For Writ Of Certiorari  
To The Oregon Supreme Court

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The City of Tigard, in its opposing brief in No. 93-518, contends this Court may not review the findings of the City of Tigard to determine if those findings are legally sufficient under heightened scrutiny to satisfy the "essential nexus" required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 840-841 (1987). The city argues:

Petitioner's continuing attack on the sufficiency of the City's findings throughout the Petition misleads this Court into thinking such an attack is possible at this point in this case. It has been thoroughly explained above that Petitioner has accepted the City's factual findings and the evidentiary support for those findings.

Brief in Opp., p. 19.

The city has erroneously characterized the nature of Mrs. Dolan's challenge of its findings - Mrs. Dolan is challenging the legal adequacy of those findings, not the evidentiary basis of those findings.

At every level of review, from the Oregon Land Use Board of Appeals (LUBA) through the Oregon Supreme Court, the petitioner, Mrs. Dolan, has contended the City's findings were legally inadequate to justify forcing her to dedicate 7000 square feet of her commercial property to the city.

To LUBA, Mrs. Dolan argued "the City [has not] demonstrated this development will place additional burdens on the City's storm drainage," noting "[i]t is not suggested anywhere in the record that this construction will contribute to the volume of upstream runoff." Petition for Review at 10, n.5, *Dolan v. City of Tigard*, 22 Or.

L.U.B.A. 617 (1992) (reproduced in Pet. for Cert., App. D). She also contended "the construction of a larger store . . . is in no way related to the City's articulated need for a bike path." *Id.*

To the Oregon Court of Appeals, petitioner again argued "the city's findings, underlying its denial of the petitioners' variance and upholding its exactions, fail to show . . . [the *Nollan* essential nexus of a] 'substantial relationship.'" Petitioner's Brief and Abstract of Record at 26, *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992) (reproduced in Pet. for Cert., App. C).

To the Oregon Supreme Court, petitioner continued to assert that "the nexus analysis conducted by the City of Tigard did not even attempt to establish that the Dolan's [sic] dedication of land was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would engender." Petition for Review at 8, *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. for Cert., App. A).

The Oregon Supreme Court, in its opinion, recognized that contention when it stated petitioners' argument was first that the "city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities," and second that the "city cannot demonstrate even a 'reasonable relationship' between their development's impacts and city's exactions." Pet. for Cert., App. A-10, 11 (footnote omitted).

Thus, at every level of review in the State of Oregon, Mrs. Dolan has asserted that the city's factual findings

are not legally sufficient to justify the city's exactions on her under this Court's rule in *Nollan*.<sup>1</sup> It is clear the burden was on the city to show those findings met the "essential nexus." See Pet. for Cert., App. A-18 (Peterson, J., dissenting) ("As does the majority, I place the burden of proving these two elements [of the exactions test in *Nollan*] on the government that exacts the conditions."). It also is clear the Oregon Supreme Court found it was possible for it to review the legal sufficiency of the city's findings. Such review was fully consistent with its precedents. See *State v. Herbert*, 302 Or. 237, 241, 729 P.2d 547 (1986) (trial court legal conclusions are not binding on appellate courts; questions of law are fully reviewable on appeal).

To this Court, as she did at LUBA and in the Oregon courts below, Mrs. Dolan argues the exactions of the City of Tigard, based upon the factual findings of the city, fail to substantially advance a legitimate state interest because those findings fail to demonstrate an "essential nexus" with the city's condition that she dedicate to it 7000 square feet of her private commercial property. Whether she ever disputed the evidentiary basis of those findings is irrelevant, if those "undisputed" findings are legally insufficient to show that nexus.

At every level below, the city asserted the same argument it now makes to this Court: that it would be inappropriate for the reviewing court to entertain an attack on "alleged deficiencies in the City's findings of fact, and the

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<sup>1</sup> Mrs. Dolan has never disputed the purported factual basis for those findings. See Pet. for Cert., App. A-16.



evidentiary support for those findings." Brief in Opp., p. 14. The city made the same futile argument at LUBA<sup>2</sup>, in the Oregon Court of Appeals<sup>3</sup>, and in the Oregon Supreme Court<sup>4</sup>. In every case, the reviewing body adjudicated the merits of the petitioners' argument the city's findings were legally insufficient to justify the exactions imposed on the Dolans by the city.

Mrs. Dolan asserts LUBA and the courts below erred, and misconstrued this Court's decision in *Nollan*, when they found those findings were legally sufficient to justify the city's exactions. As Justice Peterson of the Oregon Supreme Court concluded, "The findings here do not establish any cognizable remediable purpose attributable to the change in use." Pet. for Cert. at A-30 (Peterson, J., dissenting). Petitioner respectfully urges this Court, like

<sup>2</sup> "Petitioners do not challenge the evidentiary support for the councils [sic] findings. . . ." Respondent's Brief at 20, *Dolan v. City of Tigard*, 22 Or. L.U.B.A. 617 (1992) (reproduced in Pet. for Cert., App. D).

<sup>3</sup> "Petitioners before LUBA did not challenge the adequacy of the city's findings, nor the evidentiary support for those findings and is precluded from raising such a challenge in this proceeding." Respondent's Brief at 9 (citation omitted), *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992) (reproduced in Pet. for Cert., App. C).

<sup>4</sup> "Petitioners presented no contrary evidence to the city. These findings and the underlying evidence were not challenged by petitioners at LUBA. The only evidence in the record supports the City's conclusions. These facts and the conclusions drawn from those facts are binding on petitioners." Response to Petition for Review at 3 (citations omitted), *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. for Cert., App. A).

LUBA and the Oregon courts, to reject the city's protestations its findings may not be reviewed for legal sufficiency against the "essential nexus" test under heightened scrutiny.

DATED: November 10, 1993.

Respectfully submitted,

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